In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1021

ROBERT G. MOOREMAN, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Petitioner;

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Respondent.

REPLY BRIEF OF PETITIONER

Petitioner respectfully requests the Court to consider the following supplement-reply brief in support of its Petition for Certiorari:

We apologize to the Court for argument of facts and merits, at this point in the proceedings rather

than limiting discussion to whether or not certiorari is proper. This argument, however, is essential to prevent a distortion of the record as it existed upon review by the Court of Appeals.

Respondent in the Courts below has continuously argued that the diversion of corporate funds to Mr. Laing's personal use was "authorized." The Trial Court found to the contrary, and the Court of Appeals reversed. Procedurally when we get to the stage of determination of the merits of the controversy the question before this Court will be whether or not there was substantial evidence to justify the Trial Court's finding, and to prevent reversal by the Court of Appeals. It will be, and is, Petitioner's position that the Trial Transcript shows more than the necessary "substantial evidence" and that the reversal was unjustified. By way of example only, and continuously ignored by Respondent, even in their brief herein: In mid-August of 1960 Mr. Laing made the request for the loan against the corporate policy. Respondent required confirmation of the request by written application signed by the secretary of the corporation—Mr. Hilkert (Trial Transcript, Page 139). The application was signed by Mr. Hilkert on August 28, 1960, and the application was approved, but subject to resolution of the Board of Directors of the Laing corporation (Exhibits "H" and "I", Transcript, Page 145). Two days later, on August 30, after requiring the above double confirmation of authority, Respondent disbursed the loan proceeds and inconsistently with the cautious procedures followed on August 28, Re-

spondent's representative followed an oral request by Mr. Laing to divert $458.55 to payment of his personal premium (Exhibit "P"). The Trial Court has found that Respondent on August 30 when it made the loan disbursement did not have a right to believe that Laing was authorized to direct the diversion.

For purposes of determining whether or not the Petition for Certiorari herein should be granted the issue is whether or not the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require intervention by the Supreme Court, and whether or not the Court of Appeals has refused to follow established State law and that approved by the Supreme Court. A comparison of the Opinion of the Court of Appeals and the Trial Record reflects that both of these situations exist, and that grounds for certiorari are present. The record will substantiate that not only has the Ninth Circuit refused to recognize the Trial Court's Findings of Fact, amply supported by "substantial evidence" but that the Court of Appeals has in its Opinion misstated the facts as they appear in the record, and has based its conclusions upon false premises. Respondent and the Court of Appeals wish to hold a corporate officer, merely by reason of his office, to knowledge of embezzlements and appropriations of corporate assets by another officer, not only without actual knowledge, but without proper entry thereof on the books from which they may be ascertained. Such is not the law. While one who works daily in the operation of a business and handles returned-cancelled checks, cor-

respondence, and other miscellaneous daily papers that may come into the possession of the business may be chargeable with such knowledge, an officer or member of a Board of Directors by reason of his office is not so chargeable. Contrary to argument by Respondent, the Transcript reveals that the corporation's books did not reflect any entries which were identifiable as payment of prior premiums or reflecting the shortage of payment in the loan proceeds. Reference to the records will reflect that there are entries reflecting amounts and dates which Respondent contends are payment of prior premiums, but the entries themselves are not so identifiable; and they were not so identifiable to Mr. Hilkert. Surely the law is not that Mr. Hilkert would be charged with knowledge of the transaction behind the entry when even regular audits by the auditor did not discover any such irregularity. Mr. Hilkert did have knowledge of the loan application, because he signed the application. He did not have knowledge, and the record does not show to the contrary, how the loan proceeds were disbursed, nor could he reasonably have acquired such knowledge unless he personally intercepted the receipt in the mail of the Statement of the Policy Loan Transaction (Exhibit "P"). Respondent's argument that Laing had otherwise used corporate funds is a distortion of the record and is incapable of explanation in this brief memorandum. We request the Court review the Trial Transcript for the purpose of determining this. If certiorari is granted, it will be argued and discussed extensively. For purposes herein it is sufficient to

note that whether or not the entries on Exhibits "11" and "Z" reflect Laing's use of corporate property or credit in the past is dependent upon: (a) whether or not the entries can be construed under normal accounting practices, (b) whether or not the entries must be offset against each other, (c) whether or not they reflect what has been called "accommodation purchases," (d) whether or not they reflect adjusting entries for use of a personal bank account to clear corporate checks (in order to conceal the corporate bank account from attaching creditors). Most importantly for our purposes now the Court of Appeals' Opinion, based upon the finding that Laing was indebted in excess of $22,000.00 at the time of his death, is impossible under any construction of the records before the Court.

The Trial Court having found lack of authority in both Laing and Respondent to effect the diversion of the corporate money, Respondent has under the guise of arguing "authority" seized upon an argument which amounts to estoppel (Respondent's brief, Pages 8-13). We are not here concerned about a defense of estoppel. There is no justification in the record for a finding of estoppel and none to date has been made. The elements of such a defense are clearly distinguished from the defense of denial of authority. Consider for example that a prerequisite to estoppel is a prejudicial change in position. The authorities cited by Petitioner and which will hereafter be argued reflect a lack of authority in Mr. Laing and Respondent to make the questioned diversion. The transaction

being unauthorized as a matter of law was void, and it remains void. It has not been, and cannot be, revived by virtue of ratification, acquiescence, negligence or any other conduct of the principal. In an action filed by Mr. Hilkert, however, it *may* be possible to argue estoppel as a defense. This is not the issue or the question before the Court.

CONCLUSION

The Court will find the actual question of law involved in this Petition for Certiorari is limited. Factually the transaction was not a "humble, everyday, business transaction." Respondent surely does not contend that in the normal course of its business it does make diversions of funds owned by one policy owner to the use of other policy owners. Is Respondent "one of two innocent parties," who is being unjustly prejudiced? Even were it believed that the Laing corporation was remiss in some degree in not discovering the misappropriation, Respondent has knowingly participated in a fraud upon the Laing corporation, and having done so is subject to the repercussions which result. We are concerned only with payment of sums contractually agreed to be paid, not with infliction of any penalties or damages.

We sincerely beseech the Court to grant the Petition for Certiorari to enable review, a determination of the merits of the controversy consistent with existing

applicable law, and with the facts as set forth in the Trial Record.

Dated, Phoenix, Arizona,
March 3, 1967.

Respectfully submitted,
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